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9
10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 OAKLAND DIVISION
13

14 CASCADES COMPUTER
INNOVATION LLC,

15 Plaintiff,

16 v.

17 RPX CORPORATION; and SAMSUNG
18 ELECTRONICS, CO., LTD.

19 Defendants.

Case No. 4:12-cv-01143 YGR

**DEFENDANTS' JOINT MOTION FOR
JUDGMENT ON THE PLEADINGS**

Date: December 15, 2015
Time: 2:00 p.m.
Judge: Hon. Yvonne Gonzalez Rogers
Location: Courtroom 1

TABLE OF CONTENTS

| | <u>Page</u> |
|--|--------------------|
| NOTICE OF MOTION AND MOTION FOR JUDGMENT ON THE PLEADINGS | 1 |
| RELIEF SOUGHT..... | 1 |
| MEMORANDUM OF POINTS AND AUTHORITIES..... | 2 |
| I. INTRODUCTION | 2 |
| II. ARGUMENT | 4 |
| A. The Non-Infringement Verdict Has Immediate Preclusive Effect In This Action..... | 4 |
| B. The Non-Infringement Verdict Establishes That Cascades Lacks Standing To Seek Any Relief Based On Its Inability to License the ‘750 Patent. | 5 |
| C. The Non-Infringement Verdict Applies Equally To All Alleged Conspirators, Not Just To Samsung. | 9 |
| D. The Conspiracy and Monopsonization Claims of Cascades’ Amended Complaint Are Based Entirely On The ‘750 Patent, and Must Be Dismissed..... | 12 |
| 1. Cascades’ Explanation For Why The Alleged Conspiracy Makes “Economic Sense” Depends Entirely on The Infringement of the ‘750 Patent. | 12 |
| 2. Cascades’ “Market Power” Allegations In Support of Its Monopsonization and Rule of Reason Claims Refer Exclusively To The ‘750 Patent. | 15 |
| E. Cascades Has Failed To Plead A Plausible Conspiracy or Monopsonization Claim With Respect To The ‘130 Patent, Or Any Other Elbrus Patents..... | 16 |
| III. CONCLUSION | 21 |

TABLE OF AUTHORITIES

| | <u>Page(s)</u> |
|---|-----------------------|
| <u>Federal Cases</u> | |
| <i>Adaptive Power Solutions, LLC v. Hughes Missile Sys. Co.</i> 141 F.3d 947 (9th Cir. 1998)..... | 13, 18 |
| <i>Addamax Corp. v. Open Software Foundation</i> 152 F.3d 48 (1st Cir. 1998) | 5 |
| <i>Cascades Computer Innovation LLC v. RPX Corp.</i> 2013 U.S. Dist. LEXIS 10526 (N.D. Cal. Jan. 24, 2013) | 5, 13 |
| <i>Collins v. D.R. Horton, Inc.</i> 505 F.3d 874 (9th Cir. 2007)..... | 4 |
| <i>Copperweld Corp. v. Independence Tube Corp.</i> 467 U.S. 752 (1984) | 19 |
| <i>Dworkin v. Hustler Magazine, Inc.</i> 867 F.2d 1188 (9th Cir. 1989)..... | 5 |
| <i>Hydranautics v. FilmTec Corp.</i> 204 F.3d 880 (9th Cir. 2000)..... | 4 |
| <i>Jones Knitting Corp. v. Morgan</i> 244 F.Supp. 235 (E.D. Pa. 1965) | 5, 6, 7, 8 |
| <i>Kendall v. Visa U.S.A., Inc.</i> 518 F.3d 1042 (9th Cir. 2008)..... | 18 |
| <i>In re Lithium Ion Batteries Antitrust Litig.</i> 2014 U.S. Dist. LEXIS 7516 (N.D. Cal. Jan. 21, 2014) | 18 |
| <i>New Hampshire v. Maine</i> 532 U.S. 742 (2001) | 18 |
| <i>Nova Designs, Inc. v. Scuba Retailers Ass’n</i> 202 F.3d 1088 (9th Cir. 2000)..... | 20 |
| <i>NYNEX Corp. v. Discon, Inc.</i> 525 U.S. 128 (1998) | 20 |
| <i>In re Online DVD-Rental Antitrust Litig.</i> 779 F.3d 914 (9th Cir. 2015)..... | 7 |

| | | |
|----|---|-------------|
| 1 | <i>Scott v. Kuhlmann</i> | |
| 2 | 746 F.2d 1377 (9th Cir. 1984)..... | 4, 5 |
| 3 | <i>Sony Electronics, Inc. v. Soundview Technologies, Inc.</i> | |
| 4 | 281 F. Supp. 2d. 399 (D. Conn. 2003)..... | passim |
| 5 | <i>Sony Electronics, Inc. v. Soundview Technologies, Inc.</i> | |
| 6 | 2005 WL 1661696 (D. Conn. July 13, 2005) (“ <i>Soundview IP</i> ”) | 6, 7, 8, 16 |
| 7 | <i>United States v. 14.02 Acres</i> | |
| 8 | 547 F.3d 943 (9th Cir. 2008)..... | 9 |
| 9 | <i>United States v. E.I. duPont de Nemours & Co.</i> | |
| 10 | 351 U.S. 377 (1956)..... | 20 |
| 11 | <u>Docketed Cases</u> | |
| 12 | <i>Cascades Computer Innovation, LLC v. Samsung Electronics Co., Ltd.</i> | |
| 13 | Case No. 11-4574 (N.D. Ill.)..... | 4 |
| 14 | <u>Federal Statutes</u> | |
| 15 | Federal Rule of Civil Procedure 12(c)..... | 1, 4, 5 |
| 16 | <u>Other Authorities</u> | |
| 17 | U.S. Patent No. 7,065,750 | passim |
| 18 | P. Areeda & H. Hovenkamp, <i>Antitrust Law</i> (2d ed. 2000) | 5 |

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NOTICE OF MOTION AND MOTION FOR JUDGMENT ON THE PLEADINGS

PLEASE TAKE NOTICE that on December 15, 2015, at 2:00 p.m., or as soon thereafter as the matter may be heard, in the United States District Court, Northern District of California, at 1301 Clay Street, Oakland City Center, Oakland, CA 94612, before the Honorable Yvonne Gonzales Rogers, Defendants Samsung Electronics Co., Ltd. (“Samsung”) and RPX Corporation (“RPX”) (collectively “Defendants”) will, and hereby do, move the Court pursuant to Rule 12(c) of the Federal Rules of Civil Procedure for a judgment on the pleadings dismissing all claims in Plaintiff’s Amended Complaint for lack of standing in light of a recent judgment finding that the patent underlying Plaintiff’s claims, U.S. Patent No. 7,065,750 (the “‘750 Patent”), has not been infringed. Alternatively, Defendants move the Court for an order, based on lack of standing, barring Plaintiff from seeking any relief based on the non-infringed ‘750 Patent. This motion is based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the accompanying Request for Judicial Notice and exhibits thereto, the accompanying Proposed Order, the pleadings on file in this action, and such other matters as the Court may consider.

RELIEF SOUGHT

Defendants seek dismissal of each claim asserted against them in Plaintiff’s Amended Complaint, pursuant to Federal Rule of Civil Procedure 12(c). In the alternative, Defendants seek an order that Plaintiff lacks standing to seek any relief based on the ‘750 Patent.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Court stayed this antitrust case pending the resolution of related patent infringement litigation, which Cascades elected to file separately in the Northern District of Illinois, concerning U.S. Patent No. 7,065,750 (the “’750 Patent”). Consistent with a long line of authority approving stays of antitrust cases in favor of parallel patent litigation, the Court justified the stay on efficiency grounds. Because the ’750 Patent is “the primary patent at issue in this case,” (Dkt. No. 93 at 21:18-21), the Court observed that findings in the patent cases had “the potential to narrow substantially, or moot entirely, the antitrust issues now before this Court.” (Dkt. No. 133 at 3:23-24). In particular, the Court observed that “the question of whether Defendants are causing Plaintiff antitrust injury by refusing to negotiate individual licenses under Plaintiff’s ’750 Patent *appears to depend, both logically and legally, on whether the ’750 Patent is valid and infringed.*” (*Id.* at 5:13-16) (emphasis added). Thus, if the ’750 Patent were to be found invalid or not infringed, “any damage stemming from a refusal to negotiate a license under that patent may well prove to be illusory.” (*Id.* at 3:21-22).

The Court’s reasoning has proved well-founded, as that is *exactly* what has happened: a jury has found that Samsung did not infringe the ’750 Patent. That verdict is judicially noticeable by this Court, and has immediate preclusive effect in this action. And that preclusive effect is not limited to Samsung. Because Cascades asserts an identical theory of infringement against *all* manufacturing members of the alleged conspiracy, based on the same underlying “functionality” of the Android operating system with respect to the ’750 Patent, the Samsung non-infringement verdict applies equally to *all* of the alleged conspirators. Thus, because none of the alleged conspirators needed to license the ’750 Patent, Cascades’ claims for damages based on its inability to obtain such a license are indeed “illusory.” As a result, Cascades lacks standing to maintain claims based on the ’750 Patent.

1 This lack of standing is fatal to Cascades’ entire case, because *all* of Cascades’
2 claims depend entirely on the ‘750 Patent and the premise that it was infringed and
3 therefore held value to the Defendants. The Complaint is explicit that the ‘750 Patent was
4 the only patent that all of the alleged conspirators were using and needed to license, the
5 only patent that Cascades wanted to license to the Defendants, and the sole patent on
6 which Cascades’ valuation of the Elbrus portfolio was based. Moreover, Cascades’ only
7 explanation for why the alleged antitrust violation “made economic sense” is that all of the
8 manufacturing Defendants needed to license the ‘750 Patent, and therefore would have
9 collectively benefitted by refusing to deal with Cascades independently. And while
10 Cascades acknowledges that it is required to allege that Defendants had “market power” in
11 a “relevant market,” it is only able to do so with respect to the ‘750 Patent as used in the
12 Android operating system. Without the ‘750 Patent, then, Cascades cannot meet even the
13 most basic threshold pleading requirements for an antitrust claim.

14 Accordingly, Cascades’ last-minute attempt to shift the focus of this litigation away
15 from the ‘750 Patent and the Android operating system, and toward an entirely different
16 Elbrus patent—the ‘130 Patent involving DRAM memory chips—is flatly refuted by
17 Cascades’ own Complaint. The Complaint does not refer to a single instance of conduct
18 regarding the ‘130 Patent, much less allege the details of a plausible antitrust violation
19 directed at that patent. Indeed, the Complaint concedes that Samsung is the only alleged
20 conspirator who could have infringed the ‘130 Patent, because Samsung is the only alleged
21 conspirator who even manufactured DRAM memory chips. It is simply impossible to
22 make out a plausible antitrust claim when only one of the alleged conspirators even
23 participated in the relevant market. Stated differently, that scenario makes no economic
24 sense.

25 The bottom line is that, according to Cascades’ own allegations, this case is and
26 always has been about the ‘750 Patent. That is why Cascades alleges a conspiracy only
27 between RPX and manufacturers of Android-based mobile devices—the category of
28 products that Cascades says infringe the ‘750 Patent. That is why Cascades concedes that

1 the '750 Patent is the only patent in the Elbrus portfolio that it actually cared about
 2 licensing. That is why Cascades identifies only the '750 Patent as the economic
 3 motivation for Defendants' participation the alleged conspiracy. And that is why Cascades
 4 only alleges Defendants' "market power" as to the '750 Patent. Cascades must now stand
 5 by these allegations. The fact that Cascades' underlying theory of liability has now fallen
 6 apart does not give Cascades license to fundamentally change its story, particularly when
 7 the new story appears nowhere in the Complaint, and is directly contradicted by existing
 8 allegations.

9 **II. ARGUMENT**

10 A. The Non-Infringement Verdict Has Immediate Preclusive Effect In This 11 Action.

12 On September 21, 2015, the jury in the trial of *Cascades Computer Innovation, LLC*
 13 *v. Samsung Electronics Co., Ltd.*, Case No. 11-4574 (N.D. Ill.) returned a verdict finding
 14 that (1) the '750 Patent is not invalid but (2) Samsung did not infringe the '750 Patent.
 15 (N.D. Ill. Case No. 11-4574, Dkt. No. 420). The patent jury's finding of non-infringement
 16 has been reduced to final judgment. *See* Request for Judicial Notice ("RJN"), Ex. A. As a
 17 result, it has collateral estoppel effect against Cascades in this action. *See Hydranautics v.*
 18 *FilmTec Corp.*, 204 F.3d 880, 885 (9th Cir. 2000) (collateral estoppel applies where an
 19 issue was decided in a prior litigation, final judgment has been entered, and the party
 20 against whom collateral estoppel is asserted was a party to the prior litigation). While
 21 Defendants are not aware of any appellate proceedings, the jury's verdict has preclusive
 22 effect here regardless of whether Cascades files an appeal. *Collins v. D.R. Horton, Inc.*,
 23 505 F.3d 874, 882-83 (9th Cir. 2007) ("We have held that a final judgment retains its
 24 collateral estoppel effect, if any, while pending appeal."). And the preclusive effect of the
 25 verdict is properly raised by this motion for judgment on the pleadings under Federal Rule
 26 of Civil Procedure 12(c).¹ *See, e.g., Scott v. Kuhlmann*, 746 F.2d 1377, 1378 (9th Cir.

27 _____
 28 ¹ A motion for judgment on the pleadings is the proper vehicle for raising issues that
 arise after the pleadings have closed, but which can be resolved without the need for

1 1984) (a res judicata defense may be raised by pleadings motion where defense raises no
2 disputed issues of fact; court properly took judicial notice of records from prior litigation).

3 B. The Non-Infringement Verdict Establishes That Cascades Lacks Standing To
4 Seek Any Relief Based On Its Inability to License the ‘750 Patent.

5 “Only those who possess antitrust standing by virtue of having suffered antitrust
6 injury may bring a private action for damages for violation of the antitrust laws.”
7 *Cascades Computer Innovation LLC v. RPX Corp.*, 2013 U.S. Dist. LEXIS 10526 at *33-
8 34 (N.D. Cal. Jan. 24, 2013) (citing *Glen Holly Entm’t, Inc. v. Tektronix, Inc.*, 352 F.3d
9 367, 371 (9th Cir. 2003)). There are “four requirements for antitrust injury: (1) unlawful
10 conduct, (2) causing an injury to the plaintiff, (3) that flows from that which makes the
11 conduct unlawful, and (4) that is of the type the antitrust laws were intended to prevent.”
12 *Id.* at *34 (quoting *Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of California*, 190 F.3d 1051, 1055
13 (9th Cir. 1999)). Thus, a plaintiff fails to allege antitrust injury, and therefore lacks
14 standing, where “a force other than the antitrust violation fully accounts for the plaintiff’s
15 injury.” 2 P. Areeda & H. Hovenkamp, *Antitrust Law* § 338, at 320 (2d ed. 2000); *see also*
16 *Addamax Corp. v. Open Software Foundation*, 152 F.3d 48, 53-55 (1st Cir. 1998) (no
17 antitrust injury where alleged business injury was caused by risky nature of plaintiff’s
18 business and characteristics of its product, rather than by anticompetitive conduct).

19 In accordance with these principles, courts have held that the inability to license an
20 invalid or non-infringed patent is not a cognizable antitrust injury. The reason is simple:
21 any loss or injury in such a situation is properly attributed, not to anticompetitive conduct,
22 but to the simple fact that, by definition, *no one needs a license of an invalid or non-*
23 *infringed patent.*

24 In *Jones Knitting Corp. v. Morgan*, the plaintiff patent holder alleged that a group
25 of cloth manufacturers agreed that none of them would independently negotiate a license

26 discovery. *See* Fed.R.Civ.Proc. 12(c) (“After the pleadings are closed—but early
27 enough not to delay trial—a party may move for judgment on the pleadings.”).
28 Aside from its timing, such a motion is “functionally identical” to a motion to
dismiss under Rule 12(b)(6). *Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188,
1192 (9th Cir. 1989).

1 of the plaintiff's patent without first notifying the other members of the group. 244
 2 F.Supp. 235 (E.D. Pa. 1965) *overruled on other grounds*, 361 F.2d 451 (3d Cir. 1966).
 3 The court held that, regardless of whether this agreement constituted a "group boycott,"
 4 the plaintiff was entitled to no relief because the patent was invalid:

5 [S]ince this Court has found the Morgan patent invalid, Morgan suffered no
 6 damage because of the group boycott. If by some conceptual machination
 7 damage could be shown, it would be de minimus. If, absent the group
 8 boycott, it is reasonable to assume some one of the twelve would have taken
 a license and thus paid royalties to Morgan, Morgan would have been
 unjustly enriched since he did not have a valid patent from which a valid
 license could stem.

9 *Id.* at 239.

10 In *Sony Electronics v. Soundview Technologies Inc.*, the Court confirmed that this
 11 principle is not limited to situations where a patent is found invalid, but also applies where,
 12 as here, the patent is not infringed. 281 F. Supp. 2d. 399 (D. Conn. 2003) ("*Soundview I*").

13 In *Soundview*, a trade association and several TV manufacturers allegedly agreed to
 14 fix the price of royalties paid to the plaintiff patent holder, or, alternatively, refuse to
 15 negotiate a license altogether. The court held that, regardless of whether such an
 16 agreement existed, the plaintiff could not have suffered antitrust injury, and thus lacked
 17 standing, because the patent in question was not infringed:

18 [E]ven if an illegal agreement is proved to be one reason the [defendants]
 19 refused to license Soundview's patent, the proximate or legal cause of
 20 Soundview's licensing revenue loss is that no television
 21 manufacturer...needed a license of the patent.... The conclusion that the
 22 [defendants'] content blocking technology did not infringe Soundview's
 23 patent and Soundview's failure to present any evidence that any other
 television manufacturer uses different (and infringing) technology leads
 inexorably to the conclusion that a force other than the antitrust violation
 fully accounts for the plaintiff's injury, thus foreclosing a showing of
 antitrust injury.

24 *Id.* at 402 (internal punctuation and citations omitted).

25 Indeed, in a subsequent opinion the *Soundview* court held that "Soundview's pursuit
 26 of its antitrust claim after the finding of no-infringement must be deemed frivolous,"
 27 observing that "it should have been clear to Soundview that its antitrust claim was
 28 extinguished by the summary judgment of non-infringement," and that "its continued

1 pursuit of the claim can only be viewed as a vexatious effort to multiply the proceedings.”
2 *Sony Electronics, Inc. v. Soundview Technologies, Inc.*, 2005 WL 1661696 at *9 (D.
3 Conn. July 13, 2005) (“*Soundview II*”). As a result, the court ordered Soundview to pay
4 the defendants’ attorney fees for the antitrust portion of the case.

5 The factual scenarios at issue in *Jones Knitting* and *Soundview* are, in their relevant
6 details, identical to the scenario here. Cascades claims that an agreement among potential
7 licensees prevented it from obtaining a license of the ‘750 Patent. But even if that were
8 true, Cascades did not suffer an antitrust injury, and thus lacks standing to maintain claims
9 based on the ‘750 Patent, because any inability to procure a license is properly attributed
10 not to an antitrust violation, but to the fact that the ‘750 Patent was not infringed.

11 Defendants anticipate that Cascades may nevertheless argue that, even though the
12 ‘750 Patent has been found not infringed, the Patent still had some value to Defendants at
13 the time of the alleged negotiations—for example, because there may have been doubt at
14 that time about whether the Defendants were actually infringing, or because agreeing to a
15 license would have allowed Defendants to avoid costly litigation. But this argument
16 misses the point of the antitrust injury requirement. Certainly Cascades suffered *some*
17 *injury* due to its inability to obtain a license from Defendants, in the sense that it made less
18 money. *See Soundview*, 281 F. Supp. 2d. at 402 (“Soundview’s inability to procure
19 licensing agreements is plainly an injury in fact to its business or property”). But antitrust
20 plaintiffs must do more than allege an injury; they must allege an injury that is proximately
21 caused by an antitrust violation. *See In re Online DVD-Rental Antitrust Litig.*, 779 F.3d
22 914, 921-922 (9th Cir. 2015). And Cascades’ inability to license the ‘750 Patent is not
23 such an antitrust injury, because “the proximate or legal cause” of the injury is not an
24 antitrust violation, but the fact that the Defendants simply did not need a license to a patent
25 they were not infringing. *Id.*

26 Just as importantly, as explained by the *Jones Knitting* court, allowing Cascades to
27 recover any damages based on the ‘750 Patent, on a theory of nuisance value or otherwise,
28 would amount to improper “unjust enrichment,” because it would allow Cascades to

1 extract the equivalent of royalties from a patent on which no royalties were properly
 2 earned. *See* 244 F. Supp. at 238 (“If, absent the group boycott, it is reasonable to assume
 3 some one of the twelve would have taken a license and thus paid royalties to Morgan,
 4 Morgan would have been unjustly enriched since he did not have a valid patent from
 5 which a valid license could stem.”).

6 Alternatively, Cascades may argue that the settlement agreements it has reached
 7 with certain entities with respect to the ‘750 Patent are proof that the Patent has value,
 8 notwithstanding the subsequent non-infringement finding. But that *exact argument* was
 9 thoroughly refuted by the *Soundview* court:

10 Soundview’s assertion that settlement agreements with other television
 11 manufacturers show that there is (or was) a market for the licenses it is
 12 selling misapprehends the import of agreements to settle legal claims.
 13 Parties are encouraged to resolve lawsuits prior to final judicial
 14 determination of the merits of the case and do so for many reasons, including
 15 avoidance of the cost, delay and uncertainty inherent in the litigation and
 16 trial process, extrinsic business interests, and changed circumstances. The
 17 decision of certain television manufacturers to settle in the face of
 18 Soundview’s aggressive pre-litigation assertions of the ‘584 patent’s broad
 19 scope does not alter the stark fact that...the patented technology has been
 20 determined not to be in use by any of the [defendants].... Soundview’s loss
 21 is not proximately caused by any antitrust violation but instead by the
 22 operation of the patent laws and this Court’s summary judgment ruling of
 23 non-infringement.

24 281 F. Supp. at 402-403; *see also Soundview II*, 2005 WL 1661696 at *9 (“the licensing
 25 settlements reached with other manufacturers prior to litigation could not establish a
 26 ‘market for licenses’ supporting Soundview’s antitrust claim.”).

27 Exactly the same is true here. The fact that Cascades may have negotiated
 28 settlements or license agreements with other entities does nothing to change the fact that
 29 Cascades’ inability to obtain a license from Defendants was proximately caused, not by an
 30 antitrust violation, but by the fact that Defendants had no need to license the ‘750 Patent.

31 In addition to having no claim for damages or other relief based on *past* or *existing*
 32 infringement, Cascades is also barred from seeking injunctive relief with respect to *future*
 33 infringement of the ‘750 Patent. As previously reported to the Court, on January 29, 2014,
 34 Cascades entered into a license agreement with Google Inc. and Motorola Mobility

1 regarding Google’s Android Operating System software. The Court in the ‘750 Patent
 2 cases held that, under the doctrine of “patent exhaustion,” this license agreement precludes
 3 Cascades from asserting infringement against any entity based on use of Google’s Android
 4 Operating System *after* the date of the license. *See* RJN, Ex. B. Accordingly, the Court
 5 entered a judgment of non-infringement as to the ‘750 Patent in favor of Samsung and
 6 HTC for all use after January 29, 2014. Thus, because there can be no future infringement
 7 of the ‘750 Patent, there is nothing to enjoin.

8 C. The Non-Infringement Verdict Applies Equally To All Alleged Conspirators,
 9 Not Just To Samsung.

10 While the non-infringement verdict occurred in a trial involving Samsung, it applies
 11 equally to the other alleged conspirators, because Cascades’ theory of infringement for the
 12 ‘750 Patent is identical for all manufacturers of Android-based mobile devices. Put
 13 another way, the non-infringement verdict means that Android-based devices, regardless of
 14 who manufactures them, do not infringe the ‘750 Patent. And this fact can be properly
 15 established for purposes of this pleadings motion by judicially noticeable public filings in
 16 the ‘750 Patent cases. *See United States v. 14.02 Acres*, 547 F.3d 943, 955 (2008) (court
 17 “may take judicial notice of matters of public record and consider them” on motion for
 18 judgment on the pleadings) (internal quotations omitted).

19 As an initial matter, the only conspirators alleged in Cascades’ operative Complaint
 20 are RPX and the three so-called “manufacturing defendants” of Android-based mobile
 21 devices—Samsung, HTC, and Motorola. *See* Dkt. No. 94 (Amended Complaint), ¶ 38.
 22 Cascades does not allege any unnamed co-conspirators, or any “Doe” Defendants. And at
 23 the recent Case Management Conference in this action, the Court made clear that Cascades
 24 will not be permitted to further amend its Complaint. *See also* Dkt. No. 179 (Case
 25 Management and Pretrial Order: no amendment of parties or pleadings without leave of
 26 Court).

27 Cascades has accused all of the “manufacturer defendants”—Samsung, HTC, and
 28 Motorola—of infringing the ‘750 Patent in the same way—by manufacturing smartphones

1 and tablet computers that use specific features of the Android operating system. *See*
2 Amended Complaint at ¶ 47 (“The ‘750 patent relates to software embedded in mobile
3 phones and tablet computers that permits optimization of applications when Android
4 operating systems are used. Cascades has actively sought to license the ‘750 patent ... so
5 that the patented technology could be legally shared with the entire mobile phone and
6 tablet industry that uses Android operating systems.”).

7 Cascades explains that the ‘750 Patent applies to the Android operating system, and
8 thus applies equally to all devices that use that operating system:

9 More than 300,000 applications are available for use on Android devices and
10 only devices that meet Google’s compatibility requirements can install such
11 applications on Android-based phones and tablets. The technology of the
12 Elbrus ‘750 patent facilitates the installation and use of such applications on
13 Android devices (such as smartphones), through dependency trees, which
14 permit the optimization of the bytes code used in an application, thus
15 increasing the speed and value of the application. The ‘750 patent covers
16 such optimization techniques, is valid and has been infringed by the
17 manufacturing defendants.

18 *Id.*, ¶ 13.

19 Accordingly, in the HTC patent case (before it was resolved by settlement),
20 Cascades acknowledged that a jury determination of Samsung’s non-infringement would
21 likely be dispositive for HTC as well, because Cascades’ infringement theory against both
22 entities involved exactly the same claim of the ‘750 Patent and the same underlying
23 Android “functionality”:

24 Because Cascades has accused the same Android functionality and the same
25 claim 15 of the ‘750 patent at issue in the Samsung trial against HTC
26 devices, HTC and Cascades recognize that a final judgment of non-
27 infringement in Samsung’s could be dispositive of the same issues against
28 HTC.

29 *See* RJN, Ex. C (Cascades’ and HTC’s Motion for Stay of Proceedings).

30 Further, in issuing the Exhaustion Order described above, the patent Court
31 explicitly found that Cascades’ theory of infringement is identical for all mobile device
32 manufacturers because it is based on a feature of Google’s Android operating system
33 (which the mobile devices use), not on any features of the mobile devices themselves:

1 Cascades contends that Samsung and HTC infringe the ‘750 patent by
2 manufacturing and selling smartphones and tablets that use the Dalvik JIT
3 Compiler, which is part of the Android operating system distributed by
4 Google. According to Cascades, “[t]he claimed method is performed when a
5 user of the cellular phones operates the device for their intended purpose
6 using the Android operating system, e.g., allowing the Dalvik Virtual
7 Machine to optimize the byte code for each application.”

8 ...

9 Cascades’s claims of infringement focus on the use of a feature of the
10 Android operating system called the Dalvik JIT Compiler. Cascades has
11 identified no other feature of the defendants’ devices or the operating system
12 they use that infringes the ‘750 patent.... It is undisputed that the Android
13 operating system is a Google product; no reasonable fact finder could find
14 otherwise. The same is true of the Dalvik JIT Compiler.

15 See RJN, Ex. B (Patent Exhaustion Order) at 2-4.

16 While the Exhaustion Order was entered only as to Samsung and HTC, that is
17 because the remaining manufacturing defendant and alleged conspirator, Motorola, had
18 previously reached a settlement with Cascades. Cascades’ infringement claim against
19 Samsung and HTC was also identical to its infringement claim against Motorola. See RJN,
20 Ex. D (Cascades’ Third Amended Complaint), ¶ 14 (alleging that Motorola’s mobile
21 devices violate the ‘750 Patent by using the Dalvik JIT Compiler, and that “the claimed
22 method is performed when a user of the cellular phones operates the device for their
23 intended purpose using the Android operating system”).

24 Accordingly, Cascades sued Samsung and Motorola for infringement of the ‘750
25 Patent in the same action, and repeatedly represented to the Court that its infringement
26 theory was identical as to both Samsung and Motorola (and therefore as to HTC as well).
27 See RJN, Ex. E (N.D. Ill. 1:11-cv-06235, Dkt. No. 40) (Cascades’ Opposition to Motion to
28 Dismiss) at p. 9 (“Use of the method and, thus, direct infringement, occurs when a user
activates the DROID3 [a Motorola product] or Nexus S phone [a Samsung product] which,
in turn, activates the Dalvik Virtual Machine embedded in the phone.”). Because of the
identical theory at issue, the Samsung, Motorola, and HTC cases, along with several other
of Cascades’ ‘750 Patent cases, were consolidated for pretrial proceedings , and the court

1 issued a single claim construction order that applied equally to each defendant. *See id.*,
 2 Ex. F (N.D. Ill. 1:11-cv-06235, Dkt. No. 141) (Claim Construction Order).

3 Thus, the non-infringement verdict establishes that *none* of the RPX members who
 4 supposedly conspired not to license the ‘750 Patent were actually infringing that patent.
 5 As a result, as explained above, the alleged conspiracy could not have resulted in a
 6 cognizable antitrust injury to Cascades.

7 D. The Conspiracy and Monopsonization Claims of Cascades’ Amended
 8 Complaint Are Based Entirely On The ‘750 Patent, and Must Be Dismissed.

9 Cascades asserts two general types of claim in this action: antitrust conspiracy
 10 claims against all Defendants, which Cascades casts under both a “*per se*” and “rule of
 11 reason” theory, (*see* Amended Complaint, ¶¶ 52-83), and a monopsonization claim only
 12 against RPX (*see id.*, ¶¶ 84-107). As alleged, both types of claim rely entirely on the
 13 premise that the ‘750 Patent held value for all of the alleged conspirators. But as explained
 14 above, the non-infringement verdict establishes that Cascades’ premise is *exactly wrong*:
 15 the ‘750 Patent held *no value* to *any* alleged conspirator, because it was not being
 16 infringed. As a result, all of Cascades’ claims must be dismissed.

17 1. Cascades’ Explanation For Why The Alleged Conspiracy Makes
 18 “Economic Sense” Depends Entirely on The Infringement of the ‘750
Patent.

19 The ‘750 Patent has always been the centerpiece of Cascades’ claims. Cascades’
 20 Complaint is explicit: “With the exception of Samsung...***the patent that RPX and the***
 21 ***manufacturer defendants specifically needed access to and were already utilizing was***
 22 ***the ‘750 patent.***” Dkt. No. 94 (Amended Complaint), ¶ 19. Accordingly, aside from the
 23 ‘130 DRAM patent discussed in Section E below, Cascades does not allege that *any*
 24 alleged conspirator was infringing *any* patent in the Elbrus portfolio other than the ‘750
 25 Patent. Aside from the ‘130 Patent case against Samsung, Cascades has sued the alleged
 26 conspirators only for infringing the ‘750 Patent. *Id.*, ¶ 36 (“the manufacturing defendants
 27 were only sued for infringement of the ‘750 patent”).
 28

1 Not surprisingly, then, the ‘750 Patent was the only patent that Cascades sought to
 2 license to the Defendants, and it was only at RPX’s request that the other Elbrus patents be
 3 included in the negotiation. *Id.*, ¶ 36 (“When Cascades suggested RPX negotiate a license
 4 under just the ‘750 patent, RPX refused”); ¶ 19 (“Cascades, *in order to license the ‘750*
 5 *patent*, was willing to include the other 37 patents in the Elbrus portfolio in a license with
 6 RPX.”) (emphasis added). The other patents in the portfolio were included in the
 7 negotiations only to avoid the nuisance of future infringement claims. *Id.*, ¶ 19 (“Because
 8 patent licensees often want to ensure that they will not be sued on other patents held by a
 9 licensor, the licensee often demands that it be licensed on the licensor’s entire portfolio of
 10 patents.”). By its own allegations, Cascades’ license offer for the Elbrus portfolio was
 11 based *entirely* on its valuation of the ‘750 Patent. *Id.*, ¶ 36 (“it would make no economic
 12 sense for the manufacturing defendants to decline a license under all the Cascades/Elbrus
 13 patents effectively for the price of a license under the ‘750 Patent.”). In other words, the
 14 other Elbrus patents, which were merely tacked-on to the negotiations by RPX as a matter
 15 of policy, had no independent value. These are Cascades’ own allegations.

16 According to Cascades, then, the ‘750 Patent was (1) the only patent all of the
 17 manufacturing defendants were infringing and needed to license; (2) the only patent
 18 Cascades sought to license to the Defendants; and (3) the sole basis for Cascades’
 19 valuation of the Elbrus portfolio in its licensing offers. Thus, the fact that none of the
 20 Defendants were infringing the ‘750 Patent negates the foundation of Cascades’ claims,
 21 because it establishes that the Elbrus patents held *no value* to the alleged conspirators, and
 22 that Cascades was never entitled to a license from Defendants in the first place.

23 Put another way, without the ‘750 Patent, Cascades’ claims cease to make economic
 24 sense. *Cascades Computer Innovation LLC v. RPX Corp.*, 2013 U.S. Dist. LEXIS 10526
 25 at *38 (N.D. Cal. Jan. 24, 2013) (where “an alleged conspiracy makes no economic sense,
 26 the claim must be dismissed.”); *see also Adaptive Power Solutions, LLC v. Hughes Missile*
 27 *Sys. Co.*, 141 F.3d 947, 952 (9th Cir. 1998) (“Antitrust claims must make economic
 28 sense”). In defending its current Complaint against a motion to dismiss, Cascades

1 provided its official explanation for why it was economically rational for Defendants to
 2 participate in the alleged conspiracy. *See* Dkt. No. 103 (Cascades’ Combined Response to
 3 Motions to Dismiss) at 6-7. That explanation, which is also specifically set forth in
 4 Cascades’ Complaint, is based *entirely* on the ‘750 Patent and its relevance to mobile
 5 devices using the Android operating system:

- 6 • “Each of the manufacturing defendants is a competitor of the other two in
 7 the sale of Android operated cell phones and/or tablets and knew that use
 8 of the ‘750 patent technology improves the performance of their Android
 9 operated devices.” *Id.*; *see also* Amended Complaint, ¶¶ 6, 38(e).
- 10 • “Each also knew that it would, therefore, be at a competitive
 11 disadvantage vis-à-vis the other two manufacturing defendants if they
 12 licensed the ‘750 patent but it did not.” *Id.* at 7; *see* Amended Complaint,
 13 ¶ 38(e).
- 14 • “Each manufacturing defendant also knew that RPX had invited all of
 15 them to participate in a scheme to jointly negotiate licenses with
 16 technology providers, such as Cascades.... In the absence of that
 17 common invitation...each of the manufacturing defendants, in the
 18 furtherance of its own individual self-interest, would have individually
 19 and competitively bid to license the ‘750 patent...so as to better compete
 20 against each of the other two manufacturing defendants in the sale of
 21 Android-based mobile electronic devices.” *Id.*; *see* Amended Complaint,
 22 ¶ 38(e).
- 23 • “However, because of the common invitation, each manufacturing
 24 defendant understood and tacitly agreed that they would act together, in
 25 which case it would not be contrary to their self-interest to refrain from
 26 individually negotiating a license for the ‘750 patent at the competitive
 27 rate because not one of them would gain a competitive advantage over
 28 the others and all of them would benefit from being able to jointly
 suppress the rate at which all of them could obtain the ‘750 patented
 technology.” *Id.*; *see* Amended Complaint, ¶ 38(e).

21 Again, this is Cascades’ *own explanation* for why the alleged conspiracy was
 22 formed. Simply put, Cascades theorizes that, because all of the manufacturing defendants
 23 needed the ‘750 Patent for their Android-based mobile devices, they all stood to benefit by
 24 “acting together” to “suppress the rate” at which the ‘750 Patent—and, in turn, the other
 25 Elbrus patents that were tacked-on to the negotiations—was licensed. But the non-
 26 infringement verdict negates the entire premise of this theory. *None* of the manufacturing
 27 defendants needed the ‘750 Patent for their Android-based mobile devices. Thus, none of
 28 the manufacturing defendants had any economically rational motive to “act together” to

1 lower the price of a patent that none of them were infringing. According to Cascades' own
2 argument, without the '750 Patent its conspiracy claims make no sense.

3 2. Cascades' "Market Power" Allegations In Support of Its
4 Monopsonization and Rule of Reason Claims Refer Exclusively To
5 The '750 Patent.

6 As this Court has explained, to maintain its monopsonization claim, as well as its
7 conspiracy claims under a "rule of reason" theory, Cascades must plead that Defendants
8 had "market power" in a properly defined "relevant market." Dkt. No. 93 (Order
9 Dismissing Cascades' original Complaint) at 14 & n. 15 (citing *Nat'l Soc. of Prof'l*
10 *Engineers v. United States*, 435 U.S. 679, 690 (1978)). Cascades' original Complaint failed
11 to satisfy this requirement. *Id.* In its Amended Complaint, Cascades more specifically
12 defined the relevant market, and in so doing confirmed that the only market in which
13 Defendants had "market power" is the supposed market for the '750 Patent as used in
14 Android-based devices:

- 15 • "The relevant product market is the market for the purchase, acquisition
16 or licensing of technology covered by the Cascades '750 patent...to
17 manufacturers of mobile phones and tablets that use the Android
18 operating system." Amended Complaint, ¶ 92. It is only because
19 Defendants required the other Elbrus patents to be included in
20 negotiations that they are relevant to this case. *Id.*
- 21 • "More than 300,000 applications are available for use on Android devices
22 and only devices that meet Google's compatibility requirements can
23 install such applications on Android-based phones and tablets. The
24 technology of the Elbrus '750 patent facilitates the installation and use of
25 such applications on Android devices (such as smartphones), through
26 dependency trees, which permit the optimization of the bytes code used
27 in an application, thus increasing the speed and value of the application.
28 The '750 patent covers such optimization techniques, is valid and has
been infringed by the manufacturing defendants." *Id.*, ¶ 13.
- "Together, HTC, Motorola and Samsung sell in the United States more
than 90% of the mobile phones that use Google's Android operating
system and more than 75% of all electronic devices (both mobile phones
and tablets) that utilize the Android operating system." *Id.*, ¶ 6.
- "The manufacturing defendants dominate the sale of Android-based
products in the United States. As mobile phone suppliers that use the
Android operating systems, HTC reportedly sells 41%, Motorola 35%
and Samsung 17% of all Android-based mobile phones sold in the United
States." *Id.*, ¶ 12.

- As a result, “Defendants HTC, Motorola and Samsung...are...an important part of the Android mobile phone and tablet business requiring a license from Cascades under its patented technology. The manufacturing defendants constitute nearly the total demand for the licensing of Cascades’ patented technology and collectively enjoy substantial market power; together, they have exercised their power to control the acceptance and terms and conditions of licenses from Cascades.” *Id.*, ¶ 72.
- “RPX has obtained monopsony power over the relevant market by entering into membership agreements that make it the negotiating or purchasing agent for the manufacturing defendants who collectively control more than 90% of the mobile phone business using the Android operating system and 75% of the combined mobile phone and tablet business. RPX has used that monopsony power to deprive Cascades of the licenses of the ‘750 patent that it otherwise would have entered into at competitive market rates.” *Id.*, ¶ 88.

Thus, despite boilerplate allusions to a broader market for all of Cascades’ Elbrus patents, it is beyond dispute that Cascades only specifically alleges Defendants’ market power in a single “relevant market”—the supposed market for the ‘750 Patent as allegedly used in the Android operating system. These are the relevant market allegations on which the Court relied in sustaining Cascades’ current Complaint. *See* Dkt. No. 119 (Order on Motion to Dismiss Amended Complaint) at pp. 24, 26 (relying on allegations about relevant Android market). But the non-infringement verdict establishes that *there is no market* for the ‘750 Patent. *See, e.g., Soundview I*, 281 F. Supp. 2d. at 402 (rejecting the argument that there is a market for a non-infringed patent); *Soundview II*, 2005 WL 1661696 at *9 (“licensing settlements reached with other manufacturers prior to litigation could not establish a ‘market for licenses’” for a non-infringed patent). And without the ‘750 Patent, Cascades does not allege market power in *any* relevant market. Because this is an essential element of Cascades’ monopsonization and rule of reason claims, those claims must be dismissed.

E. Cascades Has Failed To Plead A Plausible Conspiracy or Monopsonization Claim With Respect To The ‘130 Patent, Or Any Other Elbrus Patents.

As set forth above, when the ‘750 Patent is removed from the ambit of Cascades’ claims—as it must be under the doctrine of antitrust standing—Cascades’ claims fall apart.

1 Without the ‘750 Patent, Cascades fails to allege a plausible conspiracy that makes
2 economic sense, and fails to allege that Defendants had market power in a relevant market.

3 Not surprisingly, then, Cascades has already indicated that it will attempt to
4 abandon the ‘750 Patent and Android operating system as the crux of its antitrust claims,
5 and try to refocus this case on another Elbrus patent, or on the Elbrus portfolio as a whole.
6 In recent statements to the Court, for example, Cascades has made much of a pending
7 patent infringement suit against Samsung regarding another Elbrus patent, the ‘130 Patent
8 concerning DRAM memory chips, even taking the position that this patent is “vastly more
9 important” than the ‘750 Patent. *See e.g.*, Dkt. No. 175 (Oct. 9, 2015 CMC Statement);
10 Dkt. No. 169 (Aug. 21, 2015 CMC Statement).

11 However, any attempt by Cascades to shift the focus of this litigation to another
12 Elbrus patent, or to the Elbrus portfolio as a whole, would directly contradict its existing
13 allegations that the ‘750 Patent was the *exclusive motivation* for the alleged antitrust
14 violation, and was the *sole* relevant market in which the Defendants exercised the requisite
15 market power. *See* Section II.D, *supra* (summarizing relevant allegations). Indeed, the
16 Court relied on these ‘750-specific allegations in sustaining Cascades’ current Complaint.
17 *See, e.g.*, Dkt. No. 119 (Order Denying Motions to Dismiss First Amended Complaint) at
18 14:8-10 (“Plainly, the conspiracy alleged by Cascades makes economic sense because it
19 would permit potential licensees of the ‘750 Patent to realize RPX’s publically stated
20 promise of “wholesale” pricing, provided they refrained from competitively bidding
21 against each other”); *id.* at 24:3-6 (“Here, the Manufacturing Defendants allegedly
22 comprise between 75 and 90 percent of at least the relevant submarket of buyers of
23 licenses under the ‘750 Patent. That suffices to establish a plausible market, sufficient to
24 survive a Rule 12(b)(6) motion.”).

25 Thus, even if the Court had not already ruled that Cascades may not further amend
26 its Complaint, *see* Dkt. No. 179 (Case Management and Pretrial Order), Cascades could
27 not contradict its existing theory based on the ‘750 Patent—a theory it used to survive a
28 prior motion to dismiss—merely because subsequent developments have revealed that

1 theory to be baseless. *See New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (“absent
2 any good explanation, a party should not be allowed to gain an advantage by litigation on
3 one theory, and then seek an inconsistent advantage by pursuing an incompatible theory.”)
4 (internal quotes omitted).

5 In any event, the Complaint lacks even the most basic allegations necessary to
6 support an antitrust violation based on the ‘130 Patent, or any other Elbrus patent, or the
7 Elbrus portfolio as a whole. For example, to state a viable antitrust claim, Cascades “must
8 not merely allege conduct that is conceivable but must instead allege enough facts to state
9 a claim to relief that is plausible on its face.” *In re Lithium Ion Batteries Antitrust Litig.*,
10 2014 U.S. Dist. LEXIS 7516 at *64 (N.D. Cal. Jan. 21, 2014) (internal quotations omitted)
11 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d
12 929 (2007)). To meet this plausibility standard, Cascades’ complaint must, among other
13 things, state “who, did what, to whom (or with whom), where and when?”—*i.e.*, the
14 “specific time, place or person involved in the alleged conspiracies.” *Kendall v. Visa*
15 *U.S.A., Inc.*, 518 F.3d 1042, 1047-1048 (9th Cir. 2008). As explained above, Cascades is
16 further “required to allege that each individual defendant joined the conspiracy and played
17 some role in it because, at the heart of an antitrust conspiracy is an agreement and a
18 conscious decision by each defendant to join it.” *Lithium Ion Batteries*, 2014 U.S. Dist.
19 LEXIS 7516 at *38. And Cascades must explain why any alleged antitrust violation would
20 have been economically rational. *Adaptive Power Solutions*, 141 F.3d at 952 (“Antitrust
21 claims must make economic sense”).

22 Without the ‘750 Patent, Cascades meets *none* of these pleading requirements. The
23 Complaint is devoid of even a single reference to *any* anticompetitive conduct directed at
24 or relating to the ‘130 Patent or DRAM memory chips, or any other Elbrus patent, or the
25 Elbrus portfolio as a whole. And this is not surprising, because as the Complaint explicitly
26 alleges, the ‘750 Patent was the *only* patent in the Elbrus portfolio that all of the
27 Defendants “specifically needed access to and were already utilizing.” Amended
28 Complaint, ¶ 19. Indeed, Cascades’ recent focus on the ‘130 DRAM Patent as the

1 centerpiece of the alleged antitrust violation is particularly unfounded given the
 2 Complaint’s acknowledgement that only one of the alleged conspirators—Samsung—even
 3 *manufactures DRAM*. See *id.*, ¶ 46 (“the ‘750 patent is the primary Cascades/Elbrus patent
 4 presently of interest to the defendants,” though “Samsung infringes at least one other
 5 patent relating to its DRAM business”).²

6 Further, as explained above, the Complaint’s existing explanation for why the
 7 alleged antitrust violation “makes economic sense” is that *all* of the manufacturing
 8 Defendants needed the ‘750 Patent—and *only* the ‘750 Patent—to compete with each other
 9 in the sale of Android-based mobile devices. The Complaint alleges no collective
 10 competitive need for any of the *other* Elbrus patents, or for the Elbrus portfolio as a whole.
 11 Indeed, with respect to the ‘130 Patent, the Complaint states that exactly the opposite is
 12 true: Samsung is the only alleged conspirator who manufactured DRAM, and therefore the
 13 only alleged conspirator who could have possibly infringed the ‘130 Patent. Yet there is
 14 not a single specific allegation in the Complaint about *anything* done or said by Samsung,
 15 much less any alleged acts in furtherance of a ‘130 Patent conspiracy. And indeed, such a
 16 conspiracy would not make economic sense, because Samsung would have nothing to gain
 17 from conspiring with companies that did not need to license the ‘130 Patent. Likewise, the
 18 other alleged conspirators would have nothing to gain from boycotting a patent that they
 19 clearly were not infringing, because they did not even manufacture the relevant product.

20 Similarly, Cascades fails to plead that Defendants had market power with respect to
 21 the ‘130 Patent, or any other non-’750 Elbrus patent, or the Elbrus portfolio as a whole.
 22 Far from having “market power” in the markets for the ‘130 Patent or DRAM memory
 23 chips, the Complaint makes clear that only one of the Defendants, Samsung, even arguably
 24

25 ² Indeed, it is difficult to see how Cascades could allege a plausible conspiracy with
 26 respect to a patent for which there is only a single potential “conspirator.” See
 27 *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 769 (1984) (an
 28 antitrust conspiracy claim requires “*two or more entities* that previously pursued
 their own interests separately...combining to act as one for their common benefit.”)
 (emphasis added).

1 *participated* in those markets. This is in direct contrast to Cascades’ existing allegations
 2 regarding Defendants’ market participation and market power with respect to the ‘750
 3 Patent and the Android operating system—allegations on which the Court relied in
 4 sustaining Cascades’ operative complaint. *See, e.g.*, Dkt. No. 119 at 24:3-6 (“Here, the
 5 Manufacturing Defendants allegedly comprise between 75 and 90 percent of at least the
 6 relevant submarket of buyers of licenses under the ‘750 Patent. That suffices to establish a
 7 plausible market, sufficient to survive a Rule 12(b)(6) motion.”); Dkt. No. 103 (Cascades’
 8 Combined Response to Motions to Dismiss) at 7 (explaining that each of Samsung, HTC
 9 and Motorola “is a competitor of the other two in the sale of Android operated cell phones
 10 and/or tablets”); *accord* Amended Complaint, ¶ 38(e).

11 Cascades’ inability to allege market power for patents other than the ‘750 is fatal
 12 both to its conspiracy claims under a “rule of reason” theory and its monopsonization
 13 claim. *See, e.g.*, Dkt. No. 93 (Order Dismissing Cascades’ original Complaint) at 14
 14 (“Under the rule of reason, a plaintiff must plead that the challenged agreement, by virtue
 15 of the defendants’ market power, was unreasonably restrictive of competition in a relevant
 16 market.”) (citing *Nat’l Soc. of Prof’l Engineers v. United States*, 435 U.S. 679, 690
 17 (1978)); *United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 391 (1956)
 18 (defining monopoly power as “the power to control prices or exclude competition” in the
 19 relevant market).

20 Finally, and relatedly, because Cascades does not allege that the manufacturing
 21 defendants—Samsung, HTC, and Motorola—were direct competitors in any market other
 22 than the market for the ‘750 Patent as used in the Android operating system, Cascades
 23 cannot maintain a *per se* antitrust conspiracy claim based on any other Elbrus patent. *See,*
 24 *e.g.*, *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128 (1998) (the *per se* rule for group boycotts
 25 should be limited to cases “involving horizontal agreements among direct competitors.”);
 26 *Nova Designs, Inc. v. Scuba Retailers Ass’n*, 202 F.3d 1088, 1092 (9th Cir. 2000) (“Since
 27 PADI and Rodale are not competitors, the district court correctly concluded that the *per se*
 28 rule for group boycotts should not apply to the Rodale-PADI agreement.”).

1 **III. CONCLUSION**

2 By Cascades' own allegations and admissions in this case (and others), the '750
3 Patent was the only patent the alleged conspirators needed, the only patent Cascades
4 wanted to license, and the only patent to which Cascades ascribed value. Cascades alleges
5 that it was Defendants' supposed common need for the '750 Patent that provided the
6 economic motivation for the alleged conspiracy, and that Defendants used their "market
7 power" in the market for the '750 Patent to effect the conspiracy. In short, all of Cascades'
8 claims in this case depend on the premise that the alleged conspirators were infringing the
9 '750 Patent, and therefore, absent an antitrust violation, the alleged conspirators needed a
10 license from Cascades.

11 As confirmed by the patent jury's non-infringement verdict, however, that premise
12 is false. Cascades' inability to obtain a license of the '750 Patent (and therefore the other,
13 independently valueless Elbrus patents) was proximately caused, not by any antitrust
14 violation, but by the fact that the Defendants were not infringing the '750 Patent, and
15 therefore did not need a license. As a result, Cascades lacks standing to maintain this
16 antitrust case, and the Court should dismiss all of its claims with prejudice. Alternatively,
17 if the Court finds that the Complaint plausibly alleges a conspiracy directed at patents
18 other than the '750 Patent, the Court should enter an order barring Plaintiff from seeking
19 any relief based on the non-infringed '750 Patent.

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2 Respectfully submitted.

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E-FILING ATTESTATION

I, Michael W. Scarborough, am the ECF User whose ID and password are being used to file this document. In compliance with Civil Local Rule 5-1(i)(3), I hereby attest that each of the signatories identified above has concurred in this filing.

/s/ Michael W. Scarborough
Michael W. Scarborough